

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CLINTON DANIEL JESSE
Claimant

VS.

CONTROL SERVICES, INC.
Respondent

AND

INSURANCE COMPANY UNKNOWN
Insurance Carrier

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Docket No. 1,056,326

ORDER

STATEMENT OF THE CASE

Respondent appealed the January 11, 2012, Preliminary Hearing Order (Order) entered by Administrative Law Judge (ALJ) Bruce E. Moore. Sally G. Kelsey of Lawrence, Kansas, appeared for claimant. Greg Flanagan of Mount Pleasant, Iowa, appeared for respondent.¹

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 11, 2012, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

Claimant alleges he suffered severe injuries as the result of a spider bite he received on May 18, 2009, while working for respondent. Although respondent received notice of the preliminary hearing, no one appeared on its behalf. The ALJ issued a January 11, 2012, preliminary Order that respondent pay claimant's medical expenses, to date, as authorized

¹ Mr. Flanagan identifies himself as respondent's office manager. It does not appear that Mr. Flanagan is an attorney. If not a lawyer, then the Board questions whether Mr. Flanagan can appear in a workers compensation matter for respondent, a corporation, under Kansas law. See *Babe Houser Motor Co. v. Tetreault*, 270 Kan. 502, 14 P.3d 1149 (2000). The Board recommends that respondent obtain counsel in this matter.

medical expenses. Mr. Flanagan, on behalf of respondent, filed a "Request for review of preliminary hearing"² on January 24, 2012. It states the issues appealed are: (1) Order to pay medical expenses incurred to date and (2) Claimant's workers compensation claim. Mr. Flanagan, on behalf of respondent, sent a letter/brief to the Board dated February 6, 2012, setting out reasons why the preliminary Order should be reversed. Respondent alleges that claimant did not notify it of the spider bite within 24 hours after it occurred. Respondent further asserted that claimant did not work on the date of the accident. Finally, respondent contends claimant's injuries resulted from an ATV injury that occurred ten years earlier, not the spider bite.

Claimant asserts that K.S.A. 44-534a does not grant the Board jurisdiction to review the ALJ's finding that respondent pay claimant's medical expenses. Claimant contends that the second issue in respondent's request for review lacks sufficient clarity to bring it within the Board's jurisdiction.

Therefore, the issues are:

1. Does the Board have jurisdiction to review the ALJ's preliminary Order?
2. If so, did the ALJ err in ordering respondent to pay claimant's medical bills?
Specifically:
 - A. Did claimant prove by a preponderance of the evidence that he met with personal injury by accident arising out of and in the course of his employment with respondent?
 - B. Did claimant give timely notice of the accident to respondent?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

A preliminary hearing was held on January 11, 2012. Claimant appeared with his counsel, but no one appeared for respondent. The ALJ indicated "it appears that the respondent has both actual and constructive notice of the hearing at that and we can go forward."³

Claimant is a resident of Iowa and respondent's address is 204 N. McCoy Street, P.O. Box 332, Mount Pleasant, Iowa, 52641. Respondent contracts with gas companies to apply

² Request for Review (filed Jan. 24, 2012).

³ P.H. Trans. at 8.

chemicals around their substations and compressor stations to kill weeds. On May 18, 2009, claimant received several insect bites while working for respondent near Lyons, Kansas, spraying weeds at a compressor station for Northern Natural Gas. At that time he had worked in Kansas for one week. When claimant got to the motel that night, he noticed a bite on the back of his left lower leg which turned out to be a spider bite. Claimant roomed with his foreman when working "on the road" for respondent. On May 20, 2009, claimant was taken by his foreman to Great Bend, Kansas, to the Heart of Kansas Clinic, where claimant was prescribed antibiotics.

Claimant returned to work, but after a few weeks the spider bite began leaking. While claimant was working in Mankato, Minnesota, the spider bite popped on June 12, 2009. Claimant's foreman told claimant to contact Jamie Albright, whom claimant testified was the general manager of respondent. Mr. Albright directed claimant to go to the nearest medical clinic for treatment. Claimant's foreman then drove claimant to the Albert Lea Medical Center in Albert Lea, Minnesota. Claimant testified his foreman gave information regarding respondent to hospital personnel. Hospital personnel drained the area on claimant's leg and wanted to keep him at the hospital so he could be given antibiotics via an IV.

Claimant's foreman thought it would be better if claimant treated closer to home. Hospital personnel were concerned that claimant receive treatment when he returned to Iowa and contacted the University of Iowa Hospital at Iowa City, Iowa (University Hospital) so claimant would be admitted as soon as he arrived there. Claimant's foreman then drove claimant to the University Hospital where he received additional medical treatment, including removal of a significant amount of skin and tissue from around the site of the spider bite.

At the preliminary hearing claimant testified that a large area of muscle was removed from his left lower leg and that he has significant muscle loss and nerve damage. From his left foot to the left knee, claimant has numbness and chronic pain when he walks. Claimant's left leg has a large indentation and is discolored.

Claimant testified that he spoke to Mr. Albright, who told claimant his medical bills would be covered. He also spoke to Larry Maher, a co-owner of respondent. Claimant was assured by Mr. Maher that he would make sure the paperwork went through to the insurance company. At some point, Greg Flanagan became respondent's office manager. On May 24, 2011, claimant was terminated by respondent. Approximately six months after being bitten, claimant began receiving collection notices that the medical bills remained unpaid.

Approximately ten years before May 2009, claimant was involved in an ATV accident. He had severe trauma to the left lower leg. The muscle separated from the back of his left lower leg and he had some scar tissue. No medical records from that incident were introduced.

The ALJ found claimant's testimony to be credible and that claimant was covered by the Kansas Workers Compensation Act. The ALJ also determined that respondent had actual notice of the accident as claimant's supervisor took him to a medical provider shortly

after the accident and, therefore, respondent had timely notice of the accident. It was also determined by the ALJ that claimant made a timely written claim. ALJ Moore also found claimant met with personal injury by accident arising out of and in the course of his employment with respondent and ordered respondent to pay claimant's medical bills.

In its request for review to this Board, respondent raised two issues: (1) Order to pay medical expenses incurred to date and (2) Claimant's workers compensation claim. Respondent argues claimant did not give notice of the accident to respondent and that its policy and procedure manual requires job injuries to be reported within 24 hours of the injury. Further, respondent contends claimant did not turn in any time for May 18, 2009, and signed a report for the pay period ending May 24, 2009, stating he had not been injured on the job during this pay period. Finally, respondent asserts that if claimant suffered left leg injuries, those injuries were the result of an ATV accident that occurred ten years earlier. Mr. Flanagan stated in respondent's request for review, "[d]ue to situations beyond control, the respondent, Control Services, Inc. to be represented by Greg Flanagan, Office Manager, was not able to be present and appear at the preliminary hearing scheduled at 01:30 PM, Wednesday, January 11, 2012."⁴

Claimant argues the Board does not have jurisdiction to review the first issue raised by claimant, as K.S.A. 44-534a does not permit the Board to review a preliminary Order for medical compensation. Claimant asserts the second issue raised by respondent lacks clarity to bring it within the jurisdiction for an appeal.

PRINCIPLES OF LAW AND ANALYSIS

The ALJ found that respondent received constructive and actual notice of the preliminary hearing. Despite knowing about the preliminary hearing, respondent chose not to appear. In the request for review filed by Mr. Flanagan on behalf of respondent, Mr. Flanagan indicates he was not able to appear at the preliminary hearing, but offers no explanation as to why he or another representative of respondent could not appear.

The Board has limited authority and jurisdiction when reviewing findings from preliminary hearings. The disputed issue must be one of those specifically set forth in K.S.A. 44-534a and amendments thereto or the ALJ must have exceeded his jurisdiction as required by K.S.A. 2011 Supp. 44-551. K.S.A. 2011 Supp. 44-534a permits the Board to review whether the employee suffered an accidental injury arising out of and in the course of the employee's employment and whether notice was given.

An order to pay medical expenses is not an appealable issue except where the underlying issue is whether claimant sustained a personal injury by accident arising out of and in the course of his or her employment with respondent. The second issue raised by respondent is nebulous. The letter/brief of the respondent to this Board does provide some

⁴ Request for Review (filed Jan. 24, 2012).

clarity as to what respondent is appealing and what defenses it is raising. This Board Member is satisfied that respondent appealed the issues of whether claimant suffered a personal injury by accident arising out of and in the course of his employment and timely notice. Therefore, this Board Member finds the Board has jurisdiction to review the issues raised by respondent.

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.⁵

Respondent presented no evidence at the preliminary hearing to support the defenses it raised in its letter/brief to the Board. The evidence presented by claimant that he suffered a spider bite while working for respondent on May 18, 2009, is uncontroverted. Claimant admitted he suffered left leg injuries ten years earlier in an ATV accident, but clearly explained how those injuries differed from those caused by the spider bite. Simply put, claimant proved by a preponderance of the evidence that he sustained a personal injury by accident arising out of and in the course of his employment with respondent.

K.S.A. 44-520 requires a worker to give notice of an accident to his or her employer within ten days after the date of the accident. When asked when he first told his foreman about the bite, claimant testified, "[w]ell, when we're on the road together, we share a motel room and we rode in the same truck, so we're with each other the whole time. So he pretty much knew right when it happened."⁶ It was respondent's foreman who drove claimant to the Heart of Kansas Clinic for treatment. This Board Member finds that claimant gave respondent timely notice of the accident.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011

⁵ *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

⁶ P.H. Trans. at 17-18.

⁷ K.S.A. 2011 Supp. 44-534a.

Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

CONCLUSION

1. The Board has jurisdiction to review the issues raised by respondent on appeal, as the underlying issues are whether claimant suffered a personal injury by accident arising out of and in the course of his employment with respondent and whether claimant gave timely notice of the accident to respondent.

2. Claimant proved by a preponderance of the evidence that he sustained a personal injury by accident arising out of and in the course of his employment with respondent.

3. Claimant proved by a preponderance of the evidence that he gave timely notice of the May 18, 2009, accident to respondent.

WHEREFORE, the undersigned Board Member affirms the January 11, 2012, Preliminary Hearing Order entered by ALJ Moore.

IT IS SO ORDERED.

Dated this ____ day of April, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Sally G. Kelsey, Attorney for Claimant
Greg Flanagan, Control Services, Inc., 204 N. McCoy Street, P.O. Box 332, Mount Pleasant, Iowa 52641
Bruce E. Moore, Administrative Law Judge

⁸ K.S.A. 2011 Supp. 44-555c(k).